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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GORDON W. PAULSEN
29 Broadway
New York, New York 10006
(212) 943-3980

ELISA M. PUGLIESE
NICHOLAS J. HEALY
HEALY & BAILLIE
Of Counsel

PETER J. MCHUGH
One World Trade Center
New York, New York 10048
(212) 839-7000

HILL BETTS & NASH
Of Counsel

Attorneys for Petitioners

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THE QUESTION PRESENTED

Does the "political question" doctrine immunize the United States from a suit for damages by an innocent commercial vessel which struck a mine secretly placed in Nicaraguan waters by CIA operatives who

recklessly and negligently carried out directives of the President?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Petitioners Chaser Shipping Corp. and Den Norske Krigsforsikring For Skib, Gjensidig Forening, hereby advise the Court that neither entity has any corporate parent, subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, entered on April 27, 1987, not officially reported, is printed in the Appendix (3a). The order of the United States Court of Appeals for the Second Circuit, entered on June 11, 1987, denying Petitioners' petition for rehearing en banc, is printed in the Appendix (1a). The opinion of the United States District Court for the Southern District of New York entered on December 15, 1986, officially reported at 649 F.Supp. 736 (S.D.N.Y. 1986), is printed in the Appendix (7a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1987 and the order denying the petition for rehearing en banc was entered on June 11, 1987.

The jurisdiction of this Court to review this judgment is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Chaser Shipping Corporation ("Chaser") is a Liberian Corporation with an office and place of business in Liberia. Chaser is the registered owner of M.T. IVER CHASER, which is managed on Chaser's behalf by Iver Bugge Management A/S, Larvik, Norway. A United States citizen has beneficial ownership in Chaser as do Norwegian citizens.

Petitioner Den Norske Krigsforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, A Mutual Association)("Den Norske"), based in Oslo, Norway, insures its members, ship owners and operators, against risk of loss or damage resulting from hostile activities by governments or others. M/T

IVER CHASER is entered with Den Norske. It is standard practice for owners and operators these days to carry war risk insurance whether or not they have specific plans to enter "war zones". This is so, not only because of the owner's own wishes but also because mortgagees of ships require that vessels be fully insured against war risks on a round-the-clock and round-the-globe basis. If a vessel proceeds into designated zones there is an increase in premiums. Nicaraguan waters had not been so designated at the time of the IVER CHASER incident.

These claims against the United States arise as a result of damage suffered by M/T IVER CHASER having on March 28, 1984 come into contact with a mine or mines placed by, or under the direction of, the Central Intelligence Agency ("CIA") in the harbor of Corinto,

Nicaragua. The vessel, enroute from Yuso, South Korea, to Freeport, Texas, with a part cargo of benzene, had called at Corinto to pick up a part cargo of molasses for another U.S. receiver. As a result of the ensuing explosion, M/T IVER CHASER suffered damage amounting to $1,646,905.27, plus interest and costs. The vessel, which carried a crew principally of British subjects, had unloaded no cargo during her Nicaraguan call.

The CIA was involved in the Mining of Nicaraguan Harbors

In late 1983-early 1984, the President of the United States gave authorization to the CIA to see to it that Nicaraguan harbors were mined and gave it operational responsibility therefor. See, e.g., 130 Cong. Rec. S4198 (daily ed. April 10, 1984) (statement of Sen. Goldwater to the effect that CIA Director Casey had confirmed to the Senate Intel-

ligence Committee that the President had approved the mining). See also, April 9, 1984 letter from Sen. Goldwater to CIA Director William J. Casey, reprinted in 130 Cong. Rec. H 2558-9 (daily ed. April 11, 1984).

Recent revelations have established beyond doubt that the mining was planned by staff members (including former NSC staffer Lt. Col. Oliver L. North, CIA staffer Duane R. Clarridge) of the National Security Council, CIA and the military. Schneider, "North's Record: A Wide Role in a Host of Sensitive Projects", N.Y. Times, Jan. 3, 1987, at 1, col. 3.

In January 1984, "contra" spokesmen stated in a sub-rosa local radio broadcast that they had mined Nicaraguan harbors. 130 Cong. Rec. H2918 (daily ed. Apr. 12, 1984) (statement of Rep. Boland). It later turned out that this announcement, which had limited reception, had

been issued pursuant to CIA instructions. Affidavit of Edgar Chamorro, para. 24, filed in the International Court of Justice case brought by Nicaragua and referred to in the Court's opinion, "Military and Paramilitary Activities in and against Nicaragua" (Nicar. v. U.S.), 1986 I.C.J. 14, 46-47, para. 77 (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986) (hereinafter "I.C.J. June 27, 1986 Judgment").

The mines at Corinto were laid in the access channel or in the bay where ships customarily awaited berthing orders. (1986 I.C.J. at 46, para. 76) by CIA employees working from a mother ship off Nicaragua's Pacific Coast, Chamorro Aff., para. 21. The CIA employees supervised the mining and directed Latin Americans ("UCLA's", which means Unilaterally Controlled Latino Assets) who used small highspeed boats. These UCLA's, specially

trained underwater demolition experts, destroyed pipelines and penetrated shipping lanes to place the mines. Taubman, "Americans on Ship Said to Supervise Nicaragua Mining", N.Y. Times, Apr. 8, 1984, § 1, at 1, col. 6; I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 47, para. 78. American technicians were involved in supervising the mining because relatively advanced equipment was involved: the mines were laid on the sea bed and constructed so as to respond to direct contact, sound waves and water pressure. Taubman, supra, N.Y. Times, Apr. 8, 1984; I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 46, para. 76. Newspaper sources revealed that the CIA had the assistance of a United States Navy laboratory in constructing the mines. Gelb, "Officials Say CIA Made Mines with Navy Help", N.Y. Times, June 1, 1984, at A4, col.3. See also, 130 Cong. Rec. S4201

(daily ed. April 10, 1984) (statement of Sen. Jepsen who said "U.S. citizens and non-Nicaraguan nationals hired by the CIA appear to be directly involved"); 130 Cong. Rec. S3775 (daily ed. April 4, 1984) (statement of Sen. Pell who commented that " . . . we all know, that those mines originated in the United States").

Between March 1 and March 28, 1984, while IVER CHASER was en route to Corinto, three vessels of non-Nicaraguan registry suffered damage as a result of contact with the mines: they included (1) the GEOPOTES VI (Dutch), damaged March 1, four miles outside Corinto; (2) the LOS CARIBES (Panamanian), damaged March 7, also outside Corinto; and (3) LUGANSK (USSR) damaged March 20, while entering Puerto Sandino. See Taubman, "Mine Fields: President's 'Secret War' in Nicaragua Backfires," N.Y. Times, Apr. 15, 1984, § 4, at 1, col. 1. Protests

by several nations to the United States were unheeded. See Burns, "Moscow Holds U.S. Responsible for Mines Off Nicaragua's Ports", N.Y. Times, March 22, 1984, at A1, col. 3; Smith, "Britain Criticizes Mining of Harbors Around Nicaragua," N.Y. Times, Apr. 7, 1984, at 1, col. 4.

Not until April 1984, did the involvement of the CIA in placing the mines in Nicaraguan ports begin to become known to the general public. See, e.g., 130 Cong. Rec. E 1658 (daily ed. April 12, 1984) (statement of Rep. Stokes who said "Only this week, however, did we learn that the Central Intelligence Agency, CIA, with the consent of the President and Secretaries of State and Defense, had a direct role in the planting of these mines").

The Mining Operations in Nicaragua Were Carried Out in a Manner Contrary to International Law and to Prior Practice of the United States.

The manner in which the Nicaraguan

mining operation was carried out stood in sharp contrast to the way the United States undertook the "quarantine" of Cuban waters in 1962 and the mining of North Vietnamese harbors in 1972, the closest historical precedents.

During the Cuban Missile Crisis of 1962, the United States undertook a "quarantine" of Cuba for the limited purpose of interdicting arms shipments and stopping ships carrying military materiel to Cuba, while permitting other cargoes past the quarantine. The United States publicly declared the quarantine, notified all States that might be affected and advised them of alternative routes; the President also notified the U.N. Security Council of his actions. Note, "The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors," 18 N.Y.U.J. of Int'l L. & Pol. 169, 216-217 (1985).

The 1972 mining of the North Vietnamese harbors of Hanoi and Haiphong was publicly announced by President Nixon, (Note, supra, 18 N.Y.U.J. of Int'l L. & Pol. at 219); all ships docked were given three daylight periods to leave safely; United States destroyers and gunboats stationed off Vietnam turned away any merchant ship headed for these ports and broadcasted warnings in ten spoken languages and in international signal codes. Id. at 219-220.

In contrast, the Nicaraguan mining operation, insofar as can be ascertained, stopped no arms shipments and was directed indiscriminately against innocent third-parties, such as M/T IVER CHASER, as well as the Nicaraguans. Id. at 217. See also, 130 Cong. Rec. S4142 (daily ed. April 9, 1984) (statement of Sen. Kennedy: "foreign shipping has been totally unaware of the existence of these mines").

Contrary to customary international law, the CIA operatives not only made no efforts to warn merchant ships of the mines in Nicaraguan harbors, but did not follow established procedure with respect to warnings, apparently feeling that the local radio announcements by "contra" spokesmen concerning the mines were all that was required. Note, supra, 18 N.Y.U.J. of Int'l. L. & Pol. at 220-221. But the incident involving M/T IVER CHASER clearly shows that they were wrong. As Representative Leach of Iowa stated, 130 Cong. Rec. H2897 (daily ed. April 12, 1984):

> Analogies to Vietnam are often facile, but as we look at the mining of Haiphong it is interesting to note that the decision was made in an open fashion with full public debate. In the Nicaraguan incident, Lloyds of London received earlier notification than Congress, and those in Congress who were consulted were obligated not only not to tell the public but not to talk with their own colleagues.

See also, 130 Cong. Rec. S4204 (daily ed. April 10, 1984) (statement of Sen.

Melcher: "Not to notify friends and allies is a serious blunder admitted even by many who approve the action").

It should be noted that, at the time IVER CHASER was damaged, not only were the United States and Nicaragua not at war with each other, but there were no economic or trade restrictions.* United States citizens, such as the consignees of the molasses aboard IVER CHASER were free to import goods from Nicaragua. To argue, as does the United States that IVER CHASER under the circumstances of this case assumed the risk of loss from mines is ridiculous, and naive.

The Action Filed by Petitioners

Petitioners filed their Complaint on March 26, 1987, alleging causes of action

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* President Reagan did not institute any economic embargo until 1985. Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985).

under the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq. ("SIAA"), alternatively under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680 ("FTCA"). In May 1986, the United States moved to dismiss the Complaint.

In his December 15, 1986 opinion (7a), District Judge Charles Henry Tenney, without having heard any oral argument, dismissed the Complaint on the ground that it raised a nonjusticiable political question. In its unpublished decision filed April 27, 1987 (3a), the Court of Appeals affirmed. By its order of June 11, 1987 (1a), the Court of Appeals denied the petition for rehearing en banc.

REASON FOR GRANTING THE WRIT

THE LOWER COURTS DESPERATELY NEED GUIDANCE AS TO WHEN IT IS PROPER TO DISMISS AN OTHERWISE JUSTICIABLE CLAIM ON "POLITICAL QUESTION" GROUNDS.

A. This case is one in which the assertion of the "political question" doctrine by the Executive Branch blinded the eyes of the courts below to the fact that no political question is actually involved.

Supreme Court Rule 17.1(c) provides that this Court may exercise its discretion to review on writ of certiorari when ". . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." This case fits within both of these criteria. Particularly now, in the light of recent revelations concerning activities of officials in the Executive Branch, it is timely " . . . for the courts to rethink the implications which the poli-

tical question doctrine holds for constitutional government -- and for the place of international law in the American judicial process". E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations", 14 Int'l Law. 297, 329 (Spring 1980).

Petitioners respectfully submit that resort to the political question doctrine has been erroneously used by the lower courts in this instance to avoid adjudicating what otherwise is a quintessentially justiciable dispute. As a result, the political question doctrine has been transmuted from a wholly proper constitutional doctrine of separation of powers into an excuse for automatic refusal to exercise jurisdiction over a claim whenever the Executive Branch waves the banner of "foreign relations". As stated by Professor Gordon in his previously quoted article,

> The political question defense . . . has become a staple of government pleading, a standard piece of its argument whenever governmental or administrative or political expediency counsels against judicial review of an otherwise quintessentially justiciable dispute. That all this proceeds in consequence of a judicial assertion of the dictates of the principle of separation of powers seems especially odd.

Gordon, supra at 329 (footnote omitted; emphasis supplied).

B. This case involves only liability for damages from the grossly negligent manner in which a policy decision was carried out, and does not question the policy decision itself. Therefore the court below erred in affirming its dismissal.

When considering the political question doctrine in the past, this Court identified certain categories of issues that the federal courts should be reluctant to adjudicate out of respect for the separation of powers under the Constitution:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossiblity of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). The Baker Court, in holding that a "political question" was not involved, also made it clear that courts must decide political question issues on a "case-by-case" basis. Id. at 210-211.

While the Constitution commits to the Executive Branch the authority to make foreign policy decisions, that does not insulate the Executive Branch from all judicial review in the foreign policy area. As the Baker Court specifically

noted: "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.

C. A "political question" is raised in cases involving foreign relations only when a plaintiff attacks the rationale behind the foreign policy determination. This is not the case here.

In cases involving foreign relations, the lower courts have held that political questions were raised only when plaintiffs attacked the rationale behind United States foreign policy determinations. See, e.g., Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (injunctive action by members of Congress concerning the legality of United States presence in, and military assistance to, El Salvador); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) (injunctive and

declaratory relief action by members of Congress concerning President's actions with respect to Cambodia); Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973) (declaratory relief action concerning mining of North Vietnamese ports and air and naval strikes against North Vietnamese military targets); Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985) (injunctive action against deployment of cruise missiles in England). See also, In re Korean Air Lines Disaster, 597 F.Supp. 613, 616-617 (D.D.C. 1984) (plaintiffs attacked Government's decision not to warn flight that it had strayed into Soviet airspace); Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985) (plaintiffs broadly attacked United States aid to Nicaraguan "contras", claiming widespread

attacks on innocent Nicaraguan citizens; District Court opinion did not make it clear whether Complaint contained particularized allegations of injuries; on appeal, Court of Appeals refused to apply the political question doctrine, except to those plaintiffs who were members of Congress); Rappenecker v. United States, 509 F.Supp. 1024, 1028-1030 (N.D. Cal. 1980) (plaintiffs phrased their claim in terms of Government's negligence in undertaking and executing the military rescue operation of S.S. MAYAGUEZ and of failure to warn vessel of danger of capture; thus, they challenged the President's decision-making process with respect to foreign policy and the military).

D. This case, involving only a claim for damages in tort, is well within the traditional bounds of justiciability by the federal judiciary, and well within its areas of expertise.

Courts in the past have generally refused to find political questions present where, as here, a plaintiff raises the narrow issue as to the United States' liability for damages. In Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C.Cir. 1986), a majority of the United States Court of Appeals for the District of Columbia Circuit (en banc) rejected the Government's political question argument in a suit by one who through Honduran companies owned land in Honduras, which land was confiscated with the aid of U.S. military officers to be used as a Regional Military Training Center. The court found that, rather than challenging

United States foreign policy in Central America, plaintiffs instead sought "adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiffs's private pastures when their land has not been lawfully expropriated." This was a type of dispute historically resolved by the federal courts, well within the traditional bounds of justiciability by the federal Judiciary, and well within its areas of expertise. 745 F.2d at 1512-1513.*

Similarly, in Langenegger v. United States, 756 F.2d 1565 (Fed. Cir.), cert. denied, ___U.S.___, 106 S.Ct. 78, 88

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* This Court's vacation of the Court of Appeals decision on the basis of subsequent legislation concerning the claim, 471 U.S. 1113 (1985), and the Court of Appeals' opinion on remand, 788 F.2d 762 (D.C. Cir. 1986), do not render invalid the Court of Appeals' interpretation of the political question doctrine.

L.Ed.2d 64 (1985), the court rejected the Government's assertion of the political question defense in a suit alleging that the United States was responsible for the planning, implementation and financing of a Salvadoran agrarian reform program that resulted in the confiscation of plaintiffs' property in El Salvador. Because (1) consideration of land taking claims was clearly the role of the judiciary, requiring no movement outside the judiciary's traditional role, (2) the case did not require a judicial determination of El Salvador's sovereignty or the appropriateness of its actions, nor did the case question the Executive's authority to undertake any action, and (3) it was a claim of narrow focus, requiring no second-guessing of the executive branch or detailed inquiry into the ulterior motives of the two governments, the court

reversed a finding by the Court of Claims that the action raised a nonjusticiable political question. The Langenegger plaintiffs had presented a narrow issue: whether the United States' involvement was sufficiently direct and substantial to warrant a holding that, apart from the taking by El Salvador, there was a taking by the United States obligating it to pay "just compensation." 756 F.2d at 1569-1570.*

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* On the merits, the court affirmed dismissal of the plaintiffs' complaint because there was not sufficient and direct United States involvement in the confiscation to trigger the Just Compensation Clause and, alternatively, plaintiffs still had an international forum (arbitration) available and therefore could not show that their remedies had been extinguished in order to permit them to claim expropriation. 756 F.2d at 1571-1573.

E. The gravamen of this action is that the failure of the CIA operatives to insure that proper widespread warnings of the mining were issued was a reckless disregard for the rights of others.

In the instant action, Petitioners do not challenge the United States foreign policy determinations with respect to Nicaragua. Nor do Petitioners contend that it was illegal for the United States to decide to mine Nicaraguan harbors. Rather, Plaintiffs argue that the United States operatives, having mined the harbors pursuant to Presidential authority, violated universally accepted principles of international law and prior practice because they did not issue clear warnings of danger. See I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 147-148, para. 292(8), at which the court held (14-1) that the failure of the United States to make known the existence and location of the mines laid by it violated customary

international law. See also, 130 Cong. Rec. E1659 (daily ed. April 12, 1984) (statement of Rep. Stokes to the effect that the mining was a clear and outright violation of every basic principle of respect for international law and order).

If the purpose behind these actions had been to disrupt the flow of supplies to Nicaragua, the same could have been achieved through the use of strong warnings alone. Because of the negligent and reckless manner in which the policy was executed, the United States should be held liable for any resulting damages suffered by innocent third-parties, such as Petitioners. See Langenegger, 756 F.2d at 1569-1570; Ramirez de Arellano, 745 F.2d at 1512.

The Court of Appeals erroneously categorized Petitioners' claims as alleging that "the C.I.A.'s operation, which was carried out covertly, should have

been carried out overtly." (5a). Obviously, the mining would have had to be carried out covertly. Rather, it is Petitioners' contention that, once the covert operation of mining the harbors of Nicaragua had been accomplished, the lower echelon Government personnel involved were grossly negligent in that they did not insure that ship owners and operators knew that the harbors had in fact been mined. If proper warning had been given -- as has recently been done by Iran and Iraq with respect to the Persian Gulf -- ship owners and operators could then have made an informed decision whether to avoid those harbors or to use them and thereby run the risk of loss or damage to their vessels. Instead of having the State Department or other appropriate United States Government agency issue an appropriate warning, the lower echelon United States Government

employees concerned simply left it to the "contras", i.e., the Nicaraguan insurgents, to issue warnings of the mining via local radio stations. It is obvious that such an announcement by an insurgent group, if heard at all, might very well be taken as "wishful thinking" by the "contras" and might, therefore, be heavily discounted, if not completely ignored by ship owners contemplating use of Nicaraguan harbors. The failure clearly to warn and not the fact that the mining itself had been done covertly, is the core of Petitioners' case.

F. There is no absence of judicially discoverable and manageable standards for adjudication of this case on the merits.

The nature of Petitioners' claim is such that the federal courts would not be hampered by any absence of judicially discoverable and manageable standards for arriving at an adjudication on the

merits. The federal courts traditionally have handled classic issues of liability for negligence or intentional wrongs when the United States has been sued under the SIAA or FTCA or Public Vessels Act. See, e.g., Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945) (naval authorities negligently directed vessel's movements, causing her to strike a submerged wreck); Gray v. United States, 505 F. Supp. 1069 (E.D.N.C. 1981) (allegations under the SIAA that military jet negligently discharged or caused to be discharged military ordnance which struck plaintiff's fishing vessel, causing it to explode and sink; on merits, judgment for United States); T.J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838 (C.D. Cal. 1972), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975) (allegations under the SIAA that private vessel was

struck by missile released by United States Navy airplane; recovery not permitted because claim was time-barred); Goodwin v. United States, 141 F. Supp. 445 (E.D.N.C. 1956) (suit under FTCA for loss of fishing vessel and for personal injuries arising when the vessel was struck by a falling practice bomb released from a government airplane; judgment for plaintiff); Moran v. United States, 102 F. Supp. 275 (D. Conn. 1951) (FTCA covered a suit for damages arising when fishing vessel sank as a result of an explosion alleged to have been caused by detonation of an aerial bomb entangled in the vessel's nets and where plaintiff had alleged that the bomb had been deposited in the water by military aircraft during previous experimental and trial bombing runs in the area; court denied

government's motion to dismiss). See also, American Manufacturers Mutual Insurance Co. v. United States, 453 F.2d 1380 (Ct. Cl. 1972), holding that any claim by subrogee of the owner of a ship that had been seized in the Santo Domingo harbor by rebels and had been sunk by the occupying United States Army after the rebels had directed fire upon them arose in tort and was cognizable under either the FTCA or SIAA; the Court of Claims, however, could not transfer the action to the district court because it was time-barred under both statutes.

G. There would be no reason for the trial court to delve into classified and sensitive diplomatic considerations behind the mining.

Consideration of Petitioners' claims would not require the federal courts to delve into classified and sensitive diplomatic considerations behind the mining. In those cases more closely analogous to the instant action, courts have considered and rejected similar arguments by the Government. The Ramirez de Arellano court held that such a concern was premature: if it later turned out that essential evidence was not discoverable due to Executive privilege, the district court could take appropriate action at that time. 745 F.2d at 1513. The Langenegger court held that adjudication of the plaintiffs' claims would not require discussion of sensitive and confidential communications; inquiry into the United States' actions could be

obtained from a review of typical sources such as committee reports, executive messages and other nonsecret documents. 756 F.2d at 1569. Sources of proof other than CIA secret documents exist, public utterances tantamount to admissions by the United States of involvement in the mining.

H. A judicial determination of the merits of these claims would not require the court to monitor the Executive's conduct of foreign relations nor pose a potential for embarrassment from multifarious pronouncements by various departments on one question.

Similarly, a judicial determination of Petitioners' claims would not require judicial monitoring of the Executive's conduct of foreign relations nor risk any potential embarrassment from multifarious pronouncements by various departments on one question. Petitioners have not sought judicial monitoring of foreign policy with respect to Nicaragua, nor does the case raise the specter of judi-

cial control and management of United States foreign policy; as such, the issues in this action are "qualitatively different" from those posed in the cases cited by the United States. Ramirez de Arellano, 745 F.2d at 1513. Adjudication of this case would not compel the federal courts to examine the grounds on which the Executive made the decision to mine Nicaraguan harbors: those grounds are irrelevant to this cause of action. The only issue is whether or not the United States should be obliged to compensate Petitioners under these circumstances for the damages that they suffered by reason of the reckless disregard for the rights of others shown by the manner in which the policy decision was executed. See DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D.C. Cir. Feb. 13, 1987) ("whereas

attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs").

Since the Judiciary has been traditionally charged with the task of determining whether the Executive complies with the law when implementing its policy decisions, judicial consideration of this claim would not fail to accord appropriate respect to a coordinate branch of the Government. Cf. Cranston v. Reagan, 611 F.Supp. 247, 253 (D.D.C. 1985) (complaint seeking to compel the United States to set aside nuclear energy agreements with Norway and with Sweden would raise such Baker v. Carr considerations).

I. Compensating innocent third parties for damage was a clearly foreseeable risk of not giving adequate warnings of the mining of Nicaraguan harbors.

Petitioners do not attack the decision of the Executive Branch to conduct mining operations in peacetime. However, having undertaken to mine the Nicaraguan harbors, the United States must now bear responsibility for one of the anticipated costs of implementing such a decision without warnings: the risk of damage resulting therefrom to innocent third-parties. To immunize the United States and force innocent parties to bear the loss under these circumstances would unjustly deprive the latter of valuable rights under law and would create a result that anyone seeing it on the front page of their newspaper would say "That doesn't make sense," as would be the case if a foreign power by placing mines without warning were to cause

injury to Americans, and the Americans not permitted to obtain judicial recovery. Americans reading about that in the newspaper would say that was "barbaric," just as one U.S. Senator described the Nicaraguan mining as "piracy." Butterfield, "Senior Official in CIA is Linked to North's Effort on Contra Arms," N.Y. Times, Jan. 21, 1987, at A1, col. 5.

J. The courts below erroneously extended the "political question" doctrine so as to shield the Government from liability for the very types of claims encompassed in the Suits in Admiralty and Federal Tort Claims Acts.

Petitioner respectfully submit that this case raises an important question of federal law that should not have been dismissed summarily: whether the immunity from judicial review granted to the Executive Branch by the "political question" doctrine was erroneously extended by the court below to shield the Govern-

ment from liability, not only for damages suffered by private interests resulting from the making of Executive decisions, but also for damages resulting from the grossly negligent manner in which those decisions were carried out by lower level Government personnel. By virtue of the decisions below and the summary disposition of this case, the judicial immunity granted by the "political question" doctrine has now, contrary to precedent and the rationale of the Suits in Admiralty and Federal Tort Claims Acts and universal principles of international law, been extended to cover, not only the making of the policy decision, but its faulty execution by lower level Government personnel. If the decision below is allowed to stand, the Executive will enjoy absolute immunity from judicial review for such faulty execution of its foreign policy actions. Surely, such

immunity will encourage insulated and overprotected Executive Branch officials to embark on further "adventures flawed in conception and reckless in practice." See Letter to the Editor, N.Y. Times, Sept. 2, 1987 at A26, col. 4.

The political question doctrine is, at best, a narrow one. As Baker v. Carr admonishes, "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases'." 369 U.S. at 217. Petitioners respectfully submit that the courts below have ignored this admonition and have transformed the doctrine into a wholesale abandonment of the Judiciary's role in determining such cases.

CONCLUSION

For the reason set forth above, this Petition for Writ of Certiorari should be granted.

Dated: New York, New York
September 4, 1987

Respectfully submitted,

GORDON W. PAULSEN
Counsel for Petitioners
29 Broadway
New York, New York 10006
(212) 943-3980

ELISA M. PUGLIESE
NICHOLAS J. HEALY
HEALY & BAILLIE

Of Counsel.

PETER J. McHUGH
Co-Counsel for
Petitioners
One World Trade Center
New York, New York 10048
(212) 839-7000

HILL BETTS & NASH

Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of June one thousand nine hundred and eighty-seven.

87-6027

CHASER SHIPPING CORPORATION, and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs-Appellants,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants Chaser Shipping Corporation, and Den Norske Krigforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of April one thousand nine hundred and eighty-seven.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE THOMAS J. MESKILL,
HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

----------x

87-6027

CHASER SHIPPING CORPORATION, and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs-Appellants,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellants, claiming that a cargo vessel in which they had interests was damaged by a mine secretly planted in a Nicaraguan harbor by the Central Intelligence Agency, brought suit under the Suits in Admiralty Act and the Federal Torts Claim Act against the United States for damages. The district court dismissed the complaint on the basis that it presented non-justiciable political questions. We agree with the district

court's conclusion that the complaint should be dismissed.

2. Appellants argue that they are not attacking the policy decision of the executive branch to mine the harbors of Nicaragua, but only the allegedly negligent execution of that policy. Appellants' theory is that the C.I.A.'s operation, which was carried out covertly, should have been carried out overtly. But the decision to take covert rather than overt action was itself a policy decision and as such may not be judicially reviewed in the lawsuit appellants have brought.

3. Accordingly, without expressing any views as to other avenues of redress that appellants may have open to them, we affirm the judgment of the district court.

IRVING R. KAUFMAN
Irving R. Kaufman,

THOMAS J. MESKILL
Thomas J. Meskill,

J. DANIEL MAHONEY
J. Daniel Mahoney,
Circuit Judges.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2500 (CHT)

OPINION

Chaser Shipping Corporation, and Den Norske Krigsforsikring for Skib, gjensidig forening (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs,

-against-

United States of America,

Defendant.

APPEARANCES

For Plaintiffs: HEALY & BAILLIE
29 Broadway
New York, N.Y. 10006

Of Counsel:
GORDON W. PAULSEN
ELISA M. PUGLIESE

HILL, BETTS & NASH
One World Trade Center
Suite 5215
New York, N.Y. 10048

Of Counsel:
HENRY F. WHITE, JR.

For Defendant: RICHARD K. WILLARD
Assistant Attorney General
RUDOLPH W. GIULIANI
United States Attorney
GARY W. ALLEN, Director
Torts Branch, Civil Division U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

Of Counsel:
E. PAGE MOFFETT
Office of General Counsel
Central Intelligence Agency

TENNEY, J.

The plaintiffs in this action, Chaser Shipping Corporation (herein called "Chaser"), owner of the M/T IVER CHASER, and Den Norske Krigsforsikring for Skib, gjensidig forening (The Norwegian War Risk Insurance for Ships, A Mutual Association) (herein called "Den Norske"), two foreign corporations, seek to recover over $1.6 million in damages from defendant United States of America ("Government"). The injury

for which plaintiffs seek redress occurred on March 28, 1984, in the Nicaraguan harbor of Corinto. The IVER CHASER, loaded with a cargo of molasses and benzine destined for delivery to the State of Texas, struck a mine in the harbor which caused extensive damage to her hull. Complaint, ¶¶ 15, 18. Den Norske paid Chaser for the damage to the ship pursuant to a prior agreement and asserts that it is subrogated to that extent to the rights and claims of Chaser. Complaint, ¶ 4. Plaintiffs' complaint further alleges that the Central Intelligence Agency ("CIA"), with the approval of the President, manufactured the mines and supervised and directed their placement, and that it carried out these acts in a negligent, malicious or wanton manner. Complaint, ¶¶ 8-10. Plaintiffs seek to recover under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 742 (1975)

and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) (1976) and §§ 2671-2680 (1965 and Supp. 1986).

The Government moves to dismiss plaintiffs' complaint on three grounds: (i) lack of subject matter jurisdiction; (ii) failure to state a claim upon which relief can be granted; and (iii) improper venue. Fed. R. Civ. P. 12(b)(1), (3) and (6). For the purpose of ruling on the present motion, the Court accepts the truth of the allegations in plaintiffs' complaint that the IVER CHASER was damaged by a mine, which was manufactured or whose placement was supervised and directed, by the CIA with the approval of the President. In addition to the pleadings, the parties have submitted both briefs and affidavits to the Court. Plaintiffs' submission includes various news articles summarizing information known to the public concerning the

placement of mines in Nicaragua's harbors, with particular emphasis on the involvement of the President and the CIA in such operations. These articles state that the White House, CIA and State Department all disclaimed responsibility for the mining in the early months of 1984. Plaintiffs hope to recover their damages on the theory that the Government violated a duty to innocent third-party vessels by failing to comply with its previously established practice of clearly warning such parties that mines had been placed in the harbor. Brief for plaintiffs at 15. The Government contends that the plaintiffs' action raises a nonjusticiable political question, reasoning that the Constitution vests the Executive and Legislative branches with power to conduct foreign relations and thus it would violate the principle of separation of powers "for

this Court to subject the high-level CIA and Presidential activities alleged by Plaintiffs in the complaint to the kind of judicial analysis required for determinations of negligence and proximate causation in tort." Reply Brief for the Government at 2. The Court agrees with the Government that plaintiffs' complaint seeks adjudication of nonjusticiable political questions. Accordingly, the Government's motion is granted and plaintiffs' complaint is dismissed.[1]

DISCUSSION

The undisputed starting point in any court's analysis of a purported political question issue is the Supreme Court's oft-quoted elucidation of that doctrine in Baker v. Carr, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable

and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

The Court then proceeded to note that the implication of any one of these concerns in a case would render it nonjusticiable. However, the Court added that it is necessary to make a careful inquiry as to the precise facts and posture of the case at issue before drawing any conclusions as to its justiciability. Id. This Court has conducted such an inquiry and concludes that several of the concerns raised by the Baker opinion will be implicated if the present claim for relief is adjudicated.

The plaintiffs correctly note that the Judiciary is responsible for adjudicating claims of tort liability asserted against the Government. See Greenham Women against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1336 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985). However, the Constitution commits to the Executive Branch the authority to make foreign policy decisions. Plaintiffs apparently believe that by framing an action which seeks damages under the FTCA and SIAA, but which does not seek to enjoin or declare unconstitutional the actions of the President or the CIA, they are not asking the Court to interfere in the domain of the Executive Branch. Similar claims of tort liability were asserted against the United States with regard to the events that preceded the shooting down of Korean Air Lines Flight 007 over the Sea of Japan. See

In Re Korean Air Lines Disaster of September 1, 1983, 597 F. Supp. 613 (D.D.C. 1984) (appeal docketed). The plaintiffs in Korean Air Lines alleged that the Government's (i) deployment of military aircraft near Flight 007; (ii) failure to track the flight and (iii) failure to warn the crew of the flight's departure from course constituted tortious conduct. The court dismissed these claims, stating:

> To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.... Whatever the facts and circumstances surrounding the executive decision to conduct reconnaissance activity over the waters adjacent to the Soviet Union, the method and manner of that decision may not be inquired into by the courts.

597 F. Supp. at 616-17.

Here, as in Korean Air Lines, the fact that plaintiffs seek damages and not an injunction does not mitigate

separation of powers concerns. Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award. The Court simply does not agree with plaintiffs that an inquiry into the issues of tort liability raised by their complaint would be a manageable one. The complaint reveals that this is an action by two foreign entities seeking damages for injuries suffered in foreign waters due to covert mining operations conducted there by the Executive Branch. The precise nature of the claim is that plaintiffs' injuries could have been avoided if the CIA and/or the President had conducted the mining operations with due care. The plaintiffs ask the Court to hold that, once the CIA and/or the President have established a practice

of warning innocent third parties of the possible commencement of covert military operations in an area, an enforceable duty to adhere to such practice arises. Breach of that duty would require the Government to provide monetary redress to innocent third parties injured during the operations. It is apparent that inquiries concerning such alleged breaches could not be conducted without obtaining classified intelligence documents relating to the covert operations. Plaintiffs will be unable to obtain the classified documentary evidence necessary to support their claim as it will certainly not be provided voluntarily and is clearly exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A) (1977) as secret national defense or foreign policy information. See Peterzell v. CIA, No. 85-2685, slip

op. at 1 (D.D.C. July 11, 1986); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985). Even if plaintiffs were accorded access to intelligence documents concerning the mining of the harbor at Corinto, the Court would be incapable of assessing the underlying military and diplomatic considerations which resulted in the decision to place the mines without warning to innocent third party vessels. Holtzman v. Schlesinger, 484 F.2d 2d 1307, 1310-11 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); DaCosta v. Laird, 471 F.2d 1146, 1155-56 (2d Cir. 1973).

Furthermore, it cannot be said that the Court, in adjudicating this case, could remain within the traditional realm of the judiciary. As the Supreme Court stated in Chicago & Southern Air

Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111 (citations omitted).

Plaintiffs disingenuously assert that if the Court renders an after-the-fact determination of whether the CIA and the President exercised due care, but refrains from directly enjoining U.S. policy decisions, there will be no judicial monitoring, control or management of U.S. foreign policy towards Nicaragua, but rather, the mere exercise of powers traditionally re-

served to the judiciary. To the contrary, adjudication under the FTCA or SIAA of the claims of liability plaintiffs assert would force the Court to resolve sensitive issues involving the foreign policy conduct of executive branch officials. The occurrence of such an inquiry after the completion of the covert operations in no way minimizes the danger of intrusion into the province of the Executive Branch. For the judiciary to monitor the conduct of covert military operations, whether before or after their occurrence, would be an exercise of nonjudicial discretion which Baker counsels the courts to avoid. See Haig v. Agee, 453 U.S. 280, 292 (1981); Korean Air Lines, 597 F. Supp. at 616. Such scrutiny by the judicial branch would also fail to accord appropriate respect to a coordinate branch of the Government. Id. See also Sanchez-Espinoza,

568 F. Supp. at 600. To avoid becoming embroiled in sensitive foreign policy matters such as this one, the Court declines to interpose its own will above the will of the President or the Congress.[2]

Another concern mentioned in the Baker opinion, the potentiality of embarrassment from multifarious pronouncements by various departments on one question, is also seriously implicated in this case. As the news articles submitted with the plaintiffs' affidavit point out, the White House, the CIA and the State Department all publicly denied that the Government was directly involved in the mining. An inquiry by this Court into these matters, which might result in proving that the prior declarations were erroneous, could indeed be embarrassing to the Government. See Sanchez-Espinoza, 568 F. Supp. at 600. The

Court has no choice but to heed the warning of the D.C. Circuit Court of Appeals in Sanchez-Espinoza concerning the acute "danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government ...." 770 F.2d at 209 (Scalia, J.).

CONCLUSION

In sum, the Court concludes that the plaintiffs' complaint raises a nonjusticiable political question. Thus, it is unnecessary to consider the other grounds raised by the Government in support of its motion to dismiss. Accordingly, the Government's motion is granted and plaintiffs' complaint is dismissed.

So ordered.

Dated: New York, New York
December 11, 1986

CHARLES H. TENNEY
U.S.D.J.

86 Civ. 2500 (CHT)

CHASER SHIPPING CORPORATION,
et ano. v. UNITED STATES

FOOTNOTES

1. The Government asserts two additional grounds for dismissal apart from the political question doctrine: (i) lack of jurisdiction under the FTCA and SIAA, and (ii) improper venue under the FTCA. In view of the Court's conclusion that plaintiffs' complaint raises non-justiciable political questions, it is unnecessary to consider the other grounds raised in support of the motion to dismiss.

2. In Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964), a suit which sought to enjoin nuclear testing, then Circuit Judge Warren E. Burger eloquently stated:

That appellants now resort to the courts on a vague and disoriented theory that judicial power can supply a quick and pervasive remedy for one of mankind's great problems is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their

elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make a better decision on such issues.

331 F.2d at 799.